

AUSTRALIA / JUDGMENT

Forster v Repatriation Commission [2015] FCA 198

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FEDERAL COURT OF AUSTRALIA

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Forster v Repatriation Commission [2015] FCA 198

Citation: Forster v Repatriation Commission [2015] FCA 198

Appeal from: Kevin Forster and Repatriation Commission [2014] AATA 91

Parties: KEVIN FORSTER v REPATRIATION COMMISSION

File number: NTD 9 of 2014

Judge: MANSFIELD J

Date of judgment: 11 March 2015

Catchwords: DEFENCE AND WAR – application by veteran for disability benefits – claim for post-traumatic stress disorder, alcohol dependence and hypertension – veterans conditions not in dispute – veteran found to have been the subject of abuse and bullying – delegate of respondent rejected claims – appeal to Administrative Appeals Tribunal (Tribunal) – Tribunal found that veteran's conditions not defence-caused – where Tribunal erred in law in finding that veteran did not experience events that involved actual or threatened serious injury having regard to the bullying conduct – whether Tribunal erred in so finding by reference only to the physical injury suffered by veteran - whether the Tribunal engaged in an illogical or irrational process or processes of reasoning – whether Tribunal misapplied proper meaning of "being tortured" – whether the consequences of conduct inform the quality of conduct for purposes of determining whether category 1A stressor was experienced

Legislation: Administrative Appeals Tribunal Act 1975 (Cth)

Veteran's Entitlements Act 1986 (Cth)

Administrative Appeals Tribunal Act 1975 (Cth)

Migration Act 1958 (Cth)

Crimes (Torture) Act 1988 (Cth)

Criminal Code Act 1995 (Cth)

Cases cited: Border v Repatriation Commission (No 2) (2010) 191 FCR 163

Lees v Repatriation Commission (2002) 125 FCR 331

Comcare v Fiedler (2001) 115 FCR 328

Repatriation Commission v Warren (2008) 167 FCR 511

Hill v Repatriation Commission (2005) 218 ALR 251

NABE v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 144 FCR 1

Kuswardana v Minister for Immigration and Ethnic Affairs (1981) 54 ALR 334

Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 621

Date of hearing: 16 September 2014

Date of last submissions: 26 September 2014

Place: DARWIN

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 99

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IN THE FEDERAL COURT OF AUSTRALIA

NORTHERN TERRITORY DISTRICT REGISTRY

GENERAL DIVISION NTD 9 of 2014

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN: KEVIN FORSTER

Appellant

AND: REPATRIATION COMMISSION

Respondent

JUDGE: MANSFIELD J

DATE OF ORDER: 11 MARCH 2015

WHERE MADE: DARWIN

THE COURT ORDERS
THAT:

1. The application by way of appeal is allowed in part.
 2. The decision of the Administrative Appeals Tribunal (the Tribunal) of 25 February 2015 is set aside in so far as it affirmed the decision of the respondent by a delegate that the applicant is not entitled to benefits under the Veterans' Entitlement Act 1986 (Cth) in respect of the following conditions:
 - (1) post-traumatic stress disorder; and
 - (2) alcohol dependence.
 3. The said decision in so far as it affirmed the decision of the respondent by a delegate that the applicant is not entitled to benefits under the said Act in respect of the condition of hypertension is affirmed.
 4. The application of the applicant to the Tribunal for review of a decision of the respondent by a delegate that he is not entitled to benefits under the said Act in respect of post-traumatic stress disorder and alcohol dependence is remitted to the Tribunal for rehearing according to law.
 5. The respondent pay to the applicant his costs of this application.
- Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.
- IN THE FEDERAL COURT OF AUSTRALIA
NORTHERN TERRITORY DISTRICT REGISTRY
GENERAL DIVISION NTD 9 of 2014
ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL
BETWEEN: KEVIN FORSTER
Appellant
AND: REPATRIATION COMMISSION

Respondent
JUDGE: MANSFIELD J
DATE: 11 MARCH 2015
PLACE: DARWIN

REASONS FOR JUDGMENT

INTRODUCTION

1 This is an application by way of appeal from a decision of the Administrative Appeals Tribunal (the Tribunal) under s 44 of the Administrative Appeals Tribunal Act 1975 (Cth) (the AAT Act). The Tribunal's decision was given on 25 February 2014. The Tribunal affirmed the decision of a delegate of the respondent (affirmed by a decision of the Veterans' Review Board) rejecting a claim made by the applicant for disability benefits under the Veteran's Entitlements Act 1986 (Cth) (the Act).

2 The applicant, in respect of three conditions described as alcohol dependence, post-traumatic stress disorder (PTSD), and hypertension, failed in his claim under s 70(1) of the Act for benefits because each condition was deemed to not be "defence-caused". The applicant also claimed benefits under the Act in respect of conditions described as atherosclerotic peripheral vascular disease affecting both legs, hearing loss and tinnitus. Those conditions were deemed to be defence-caused. They did not give rise to any issues on the application.

3 The applicant was born in 1957 and joined the Australian Regular Army (the Army) in January 1973 when he was 15 years old. He was ultimately discharged in November 1978 for being absent without leave. He commenced his apprenticeship training at the Army Apprentices School at Balcombe, Victoria. After completing his trade training as a mechanic, the applicant was posted to Broadmeadows, Victoria, and then to the 3rd Battalion Royal Australian Regiment, based at Woodside, South Australia. He claims that he suffers the three conditions as a consequence of abuse and bullying during his service in the Army.

4 The period in which the applicant completed his trade training is relevant to this proceeding. Upon arrival at Balcombe, the applicant shared quarters with a more senior apprentice. However that apprentice's service with the Army was terminated a short time after the applicant's arrival. It was accepted by the Tribunal that the applicant was subjected to abuse and bullying whilst at Balcombe. It concluded that there was a culture of bullying at Balcombe during the time the applicant was there. The Tribunal took the view that the senior apprentices who were in their second or third year of service, would routinely bully or harass first-year apprentices. During the first few months of the applicant's service, an incident occurred that led to four senior apprentices being summarily discharged from the Army over an incident that left one junior apprentice in hospital with what a contemporary newspaper report described as "a broken nose and other facial injuries". The Tribunal also noted that another newspaper report published an article where the four discharged apprentices described how they had earlier been treated in a

similar manner when they were first-year apprentices. It was not a live issue before the Tribunal that the applicant suffers from the three conditions referred to. The real issue in respect of each of the three conditions under consideration was whether they were defence-caused. As noted, on 25 February 2014, the Tribunal affirmed the decision that each of them was not defence-caused.

5 This application is confined to an appeal on a question or questions of law: s 44 of the AAT Act. Before addressing the grounds of appeal, it is first necessary to record the relevant legislative and related provisions.

LEGISLATIVE SCHEME

6 Section 70(1) of the Act provides for the Commonwealth to be liable to pay a pension by way of compensation to a member of the armed forces if that member suffers incapacity from a "defence-caused injury or a defence-caused disease". Section 70(5) relevantly provides:

For the purposes of this Act, the death of a member of the Forces (other than a member to whom this Part applies solely because of s 69A) or a member of a Peacekeeping Force shall be taken to have been defence-caused, an injury suffered by such a member shall be taken to be a defence-caused injury or a disease contracted by such a member shall be taken to be a defence-caused disease if:

- (a) The death, injury or disease, as the case may be, arose out of, or was attributable to, any defence service, or peacekeeping service, as the case may be, of the member.

7 Section 120 of the Act deals with the standard of proof. Section 120(4) of the Act directs the decision-maker, relevantly the Tribunal on review, to decide the matter to its reasonable satisfaction. Section 120(4) is affected by s 120B, which applies to the applicant's claims: s 120B(1)(b). Section 120B(3) directs the respondent, and on review the Tribunal, to be reasonably satisfied that the conditions were defence-caused only if:

- (a) the material before the Commission raises a connection between the injury, disease or death of the person and some particular service rendered by the person; and
- (b) there is in force;
 - (i) a Statement of Principles determined under subs 196B(3), or (12); or
 - (ii) a determination of the Commission under subs 180A(3);

that upholds the contention that the injury, disease or death of the person is, on the balance of probabilities, connected with that service.

8 There was in force at material times a Statement of Principles concerning each of the three medical conditions claimed by the applicant, as determined by the Repatriation Medical Authority under s 196B.

9 The relevant parts of the applicable Statements of Principles are referred to below.

the decision under review

10 The Tribunal had considerable concerns about the reliability of the applicant's evidence, and gave reasons for that view.

11 Despite that concern, the Tribunal accepted the evidence about the bullying during the applicant's time of service at Balcombe, including that its level "slowed right down" after several senior apprentices were discharged after assaulting and inflicting a broken nose and other injuries upon a junior apprentice. Other practices, which were accepted by the Tribunal, included senior apprentices coming into the applicant's room in the evening, upending his bed and assaulting him. These practices were called "bastardising" or "hazing". The Tribunal said that, more accurately, the conduct was bullying involving physical assaults, both the actual and threatened application of force, and verbal abuse. It is convenient, as a shorthand expression, to describe it as the "bullying conduct" unless the context requires more. The applicant gave evidence that he was "absolutely terrified" during these incidents, which occurred more than twice a week, prior to the discharge of the four senior apprentices. There was other evidence which confirmed objectively the nature and frequency of the bullying conduct.

12 The Tribunal's findings on the three claimed medical conditions are as follows.

Post-traumatic stress disorder

13 As noted, the diagnosis of PTSD was not in dispute.

14 It is accepted that PTSD is dealt with in Statement of Principles concerning post-traumatic stress disorder No. 6 of 2008 (Cth) (SoP No 6).

15 Pursuant to SoP No 6 cl 3(b)(A), PTSD is a psychiatric condition in which, relevantly:

(A) The person has been exposed to a traumatic event in which:

- (i) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others; and
- (ii) the person's response involved intense fear, helplessness, or horror.

16 Clause 6 of SoP No 6 identifies the factors that must exist before it can be said that, on the balance of probabilities, PTSD is connected with the circumstances of a person's relevant service. The applicant relies on the factor cl 6(a):

- (a) experiencing a category 1A stressor before the clinical onset of posttraumatic stress disorder;

17 Clause 9 of SoP No 6 defines "a category 1A stressor" as meaning:

one or more of the following severe traumatic events:

- (a) experiencing a life threatening event;

- (b) being subject to a serious physical attack or assault including rape and sexual molestation;
or
- (c) being kidnapped with a weapon, being held captive, being kidnapped, or being tortured;

18 The Tribunal considered two possible connecting factors within the cover of a category 1A stressor, namely whether the applicant was subjected to "serious physical attack or assault" and alternatively that he was "being tortured". The Tribunal rejected each contention because it did not accept that they applied to the applicant.

19 The Tribunal relied on the decision of Reeves J in *Border v Repatriation Commission (No 2)* (2010) 191 FCR 163 (Border) where his Honour observed at [50]:

[T]he definition of "a category 1A stressor" makes no express mention of the type of feelings experienced by the veteran. To the contrary, it simply states that such a stressor "means one or more of the following severe traumatic events". Furthermore, whilst subpara (a) of the definition incorporates the experience of the veteran in the event by defining it as "experiencing a life-threatening event", the other two subparas – (b) and (c) – focus on the inherent nature of the event concerned rather than the feelings or emotions engendered by it. Thus, they variously refer to: "a serious, physical attack", "assault", "rape", "sexual molestation", "being threatened with a weapon", and "being held captive, being kidnapped or being tortured". Whilst all these events would obviously evoke feelings of severe stress, the definition seems to deliberately eschew any such subjective factor as a relevant consideration in determining whether the event falls within the definition.

20 The Tribunal recognised that the subjective response to the events complained of may provide some guidance to the objective seriousness of the events, but due to concerns about the applicant's credibility, it did not accept that his descriptions of his responses to the bullying conduct were accurate, so that his evidence did not inform its assessment of the bullying conduct.

21 As the reasoning of the Tribunal on this point was the subject of one of the asserted errors of law, it is convenient to set out the Tribunal's reasoning at [25] of its Reasons for Decision:

What is conveyed by the expression "serious physical attack or assault" is to be considered by reference, amongst other things, to the context in which the words appear. That context includes the introductory words "serious traumatic events" as well as the other descriptors within the subparagraphs. I accept, as [the applicant] submitted, that what must be shown is that [he] was subject to a serious physical attack or assault and that it is not necessary to separately demonstrate that the conduct complained of amounted to a severe traumatic event. The presence of those words, however, and the nature of the other descriptors give a sense of the necessary seriousness of the serious physical attack or assault. On the view most favourable to [the applicant] the assaults of which he complains are relatively minor. He refers to cuts and bruises on more than one occasion but they required no treatment and he made no contemporaneous complaint. In his own statement he described the claimed verbal and

psychological abuse as being worse than any assaults. I am not satisfied that [the applicant] was subjected to a serious attack or assault whether viewed singly or collectively.

22 The Tribunal also rejected the contention that what the applicant suffered amounted to being tortured. It said that "torture" has no special legal meaning and ought to be given its ordinary usage, that is, whether the injuries were an "infliction of severe bodily pain predominately, but not always, used to extract information from the subject". It took into account the applicant's young age and his description of the nature and frequency of the bullying conduct but was left well short of being satisfied that it amounted to torture.

23 Consequently, although it accepted that the bullying conduct complained of had occurred, the Tribunal was not satisfied that, in his defence-service, the applicant had experienced a category 1A stressor within the meaning of SoP No 6.

Alcohol dependence

24 The Tribunal accepted the applicant's contention that he has alcohol dependence. His alcohol dependence was in remission from 1996 until recently. In his report of 8 July 2011, Dr Ewer made a diagnosis of alcohol dependence (in remission). However, recently, Dr Ewer revised the diagnosis to remove the "in remission" qualification. The issue was the connection between alcohol dependence and the bullying conduct experienced during the course of the applicant's service in the Army.

25 It is accepted that alcohol dependence is dealt with in Statement of Principles concerning alcohol dependence and alcohol abuse No. 2 of 2009 (Cth) (SoP No 2). As noted, it was not in issue that the applicant suffers from alcohol dependence, as defined in SoP No 2. Relevantly, cl 6(b) and cl 6(e) of SoP No 2 provide:

The factors that must exist before it can be said that, on the balance of probabilities, alcohol dependence or alcohol abuse or death from alcohol dependence or alcohol abuse is connected with the circumstances of a person's relevant service are:

- (a) ...
- (b) experiencing a category 1A stressor within two years before the clinical onset of alcohol dependence or alcohol abuse;
- ...
- (e) being the recipient of severe childhood abuse within the ten years before the clinical onset of alcohol dependence or alcohol abuse;
- ...

26 A "category 1A stressor" is defined in cl 9 of SoP No 2 in the same terms as in PTSD cl 9 of SoP No 6. The term "severe childhood abuse" is defined in cl 9 of SoP No 2 as meaning:

- (a) serious physical, emotional, psychological or sexual harm whilst a child aged under 16 years; or
- (b) neglect involving a serious failure to provide the necessities for health, physical and emotional development, or wellbeing whilst a child under 16 years;

where such serious harm or neglect has been perpetrated by a parent, a care provider, an adult who works with or around that child, or any other adult in contact with that child;

...

27 In relation to the applicant's contention relating to cl 6(a) of SoP No 2, the Tribunal said there was no evidence from which the time of clinical onset could be determined, making it impossible to determine whether the clinical onset of alcohol dependence occurred within two years of the bullying conduct complained of by the applicant. In any event, like the reasoning behind the Tribunal's findings in relation to PTSD, it considered the bullying conduct suffered by the applicant to be too minor to be classified as a category 1A stressor under SoP No 2.

28 Alternatively, the applicant relied on cl 6(e) of SoP No 2, namely that he suffered "severe childhood abuse". He contended that apprentices generally received instruction in their various trades during the day. The relevant instructing staff would leave the Balcombe camp in the weekday afternoons and return the following morning. In the interim, there was only one duty officer and one non-commission officer supervising 300 to 400 apprentices. In effect, the applicant contended that the senior apprentices were overseeing the camp in that time.

29 The applicant contended that at least during the period before his 16th birthday in April 1973, when he was a child for the purposes of the applicable provisions, he suffered from neglect at the hands of the senior apprentices, who were care providers. The senior apprentices, by reason of the bullying conduct, did not provide a reasonably safe environment. Alternatively, he claimed, the military hierarchy (the superiors to senior apprentices) were care providers and they were neglectful in placing those people in charge when they were inadequately trained or supervised to perform the role.

30 The Tribunal rejected the applicant's argument that the senior apprentices were care providers. SoP No 2 does not define "care provider". The Tribunal concluded that a "care provider" was a person who had a formal role in the provision of care to the child. The senior apprentices had no such role. Nor were they in charge of the junior apprentices. Consequently, the Tribunal said that cl 9(b) was not satisfied.

31 Clause 9(a) provided an alternative path. That claim also failed because the Tribunal was not satisfied that the bullying conduct caused "serious physical harm" and there was no evidence which satisfied the Tribunal that the applicant suffered serious emotional or psychological harm as a child between January 1973 and April 1973.

32 Further, even if the applicant was the recipient of severe childhood abuse, his argument failed on the issue of clinical onset. As required by SoP No 2 cl 6(e), a category 1A stressor must have been experienced, in the case of severe childhood abuse, within ten years before the clinical onset of alcohol dependence.

33 Dr Ewer's report records a history of excessive alcohol consumption commencing during the applicant's period of service at Balcombe, which Dr Ewer described as "alcohol misuse". The Tribunal noted that alcohol dependence requires more than just excessive consumption or misuse of alcohol. Clause 3(b) of SoP No 2 defines "alcohol dependence". After noting that, the Tribunal observed that SoP No 2 does not define clinical onset, but applied the formulation of the Full Court in *Lees v Repatriation Commission* (2002) 125 FCR 331 quoting Branson J in *Repatriation Commission v Cornelius* [2002] FCA 750, which refers to "clinical onset" at [13]:

... there is clinical onset of a disease, either when a person becomes aware of some feature or symptom which enables a doctor to say the disease was present at that time, or when a finding is made on investigation which is indicative to a doctor of the disease being present ...

34 Dr Ewer's reports, the Tribunal found, do not address the time of clinical onset but the Tribunal inferred from his report of July 2011 that there had been clinical onset of alcohol dependence by 1997 when the applicant ceased drinking. The issue was whether it had occurred earlier. There must be "clinically significant impairment or distress" manifested by several of the symptoms listed in the diagnostic criteria. Ultimately, the Tribunal found that Dr Ewer's report of July 2011 and the applicant's excessive consumption of alcohol were insufficient evidence to support the contention that there was a clinical onset of alcohol dependence in the ten years after the applicant's experiences in Balcombe in the period from January 1973 to April 1973, that is by April 1983. There was no independent evidence of the clinical onset of alcohol dependence by April 1983, and the applicant's own evidence of excessive alcohol consumption did not satisfy the Tribunal on the point because of its concerns about his reliability as a witness. Consequently, on that basis too the Tribunal said the Repatriation Commission decision to reject the claim that his alcohol dependence was defence-caused was correct.

Hypertension

35 It is accepted that hypertension is dealt with in Statement of Principles concerning hypertension No. 64 of 2013 (Cth) (SoP No 64).

36 Clause 3(b) of SoP No 64 defines hypertension as meaning, relevantly:

[p]ersistently elevated blood pressure, diagnosed by a medical practitioner and evidenced by:

(i) a usual clinic blood pressure reading of greater than or equal to 140 mmHg systolic or greater than or equal to 90 mmHg diastolic, or equivalent levels using ambulatory blood pressure measurement; or

(ii) a usual home blood pressure reading of greater than or equal to 135 mmHg systolic or greater than or equal to 85 mmHg diastolic.

37 I note that an earlier instrument, Statement of Principles concerning hypertension No.36 of 2003 (Cth) (SoP No 36), was in force when the applicant made his claim, but with respect to this applicant, there were no substantive amendments that would require separate consideration.

38 Relevantly, on the basis that the applicant suffers from hypertension as defined, cl 6(b) of SoP No 64 provides for the necessary connection with defence-service:

The factor that must exist before it can be said that, on the balance of probabilities, hypertension or death from hypertension is connected with the circumstances of a person's relevant service are:

- (a) ...
- (b) consuming an average of at least 500 grams of alcohol per week for at least the six months before the clinical onset of hypertension; or ...

39 SoP No 36 did not differentiate between clinic blood pressures and home blood pressures and only required evidence of the usual blood pressure reading where the systolic reading was greater than or equal to 140 mmHg or whether diastolic reading was greater than or equal to 90 mmHg.

40 The Tribunal found that there was no evidence of the date or the approximate date of clinical onset of hypertension, and no evidence from which that date might be reasonably inferred. There was also no evidence that details the extent of the applicant's consumption of alcohol with any degree of particularity.

41 The applicant relied on medical records indicating his blood pressure reading from between the periods 1972, before his entrance into the Army, until 2010:

- (1) October 1972 – reading of 125/85;
- (2) September 1976 – 138/78; and
- (3) March 2010 – 160/92.

42 The applicant also relied on evidence that he drank heavily up until 1997. However, the Tribunal noted that there was an absence of evidence from which any informed conclusion could be drawn about the extent of the applicant's drinking at any particular time. The Tribunal was not prepared to infer, despite the urging of the applicant, that his diastolic blood pressure reached 140 mmHg at some point before 1997 when he stopped drinking. Based on the evidence, it was not possible to determine when the clinical onset of hypertension occurred. Neither was it open, in the Tribunal's view, to conclude that the evidence supported the contention that the applicant consumed, on average, at least 500 grams of alcohol per week at any particular time, even if it found that clinical onset occurred prior to 1977.

43 Consequently, the Tribunal was not reasonably satisfied that the applicant's hypertension is connected with his defence service, or that his hypertension is defence-caused.

THE ISSUES

44 The applicant appeals the Tribunal's conclusion regarding PTSD, alcohol dependence, and hypertension. The supplementary notice of appeal outlines the following questions of law (question (2A) was added by leave at the hearing):

Post-traumatic stress disorder

- (1) Did the Tribunal pose and answer wrong question/s in determining whether a "factor" exists within the meaning of cl 6 of SoP No 6?
- (2) Did the Tribunal fail "to make relevant consideration/s" (sic) in determining whether a "factor" exists within the meaning of cl 6 of SoP No 6?

(2A) Did the Tribunal engage in an illogical or irrational process or processes of reasoning in applying SoP No 6?

Alcohol Dependence

- (3) Did the Tribunal err in law by failing to make the necessary determination or determinations pursuant to SoP No 2, as required by the Act?
- (4) Did the Tribunal pose and answer the wrong question or questions in determining whether a "factor" exists within the meaning of cl 6 of SoP No 2?
- (5) Did the Tribunal provide adequate and sufficient reasons for its application of SoP No 2, as required by s 43(2B) of the AAT Act?
- (6) Did the Tribunal engage in illogical or irrational process/es of reasoning in applying SoP No 2?

Hypertension

- (7) Did the Tribunal err in law by failing to make the necessary determination or determinations pursuant to SoP No 64, as directed by the Act?
- (8) Did the Tribunal engage in an illogical or irrational process or processes of reasoning in applying SoP No 64?

45 As noted, at the hearing, I gave the applicant leave to insert para (2A) to the questions of law and to amend the grounds of appeal in relation to PTSD in the supplementary notice of appeal to reflect that insertion. The respondent was given leave to respond to the amendments via a supplementary written submission. That submission has been duly considered.

CONSIDERATION

Post-traumatic stress disorder

46 The applicant's challenge to the Tribunal's conclusions is that the Tribunal misconstrued the words "torture" and "assault" within the meaning of cls 6(a) and 9(c) of SoP No 6, and therefore posed and answered the wrong legal questions, and that the Tribunal failed to make relevant considerations in determining whether a "factor" exists within the mean of cl 6 of SoP No 6, including that the Tribunal failed to take into account mental suffering in answering the legal questions as to whether the applicant experienced "torture" within the meaning of a category 1A stressor in cl 9(c) of SoP No 6.

(i) The torture claim

47 In relation to the issue of torture, there may be a preliminary issue as to whether the stressor must be external to the Australian Defence Force rather than internal. It might be said that the genus of cl 9(c) of the definition of a category 1A stressor requires a person or authority external to the Australian Defence Force personnel to engage in the conduct. The terms "being held captive" and "being kidnapped" may suggest that it is designed to cover only external conduct. The applicant submits that approach is too restrictive, and that cl 9(c) of SoP No 6 was designed to capture the very situation that the applicant was in. Otherwise, he says, cl 9(c) would have little scope for operation because the definition of "relevant service" in cl 9 excludes operational service, and includes defence service (other than hazardous service) under the Act. He asks rhetorically how, given that definition, cl 9(c) concerning the definition of a category 1A stressor could have any meaningful content. For the reasons which follow, I do not need to decide that question.

48 There was a further matter raised by the respondent in relation to the claim based on torture. During the hearing before the Tribunal, the applicant through his counsel apparently abandoned his contention that he was tortured. However, the Tribunal proceeded to consider that claim. At [26] of its reasons, the Tribunal found that the word "torture" has no special meaning and ought to be given its ordinary usage "the infliction of severe bodily pain" for the purpose of extracting information from the subject. The applicant's contention is that the term does have a special legal meaning which is not limited to severe bodily pain, but extends to severe physical and mental pain. The respondent in the circumstances said, first that there could be no material error on a question of law as to the proper consideration of "being tortured" as a category 1A stressor because the claim had been abandoned before the Tribunal.

49 The authorities to which the Court was referred on the issue as to whether the applicant, in the circumstances, may raise the matter on this application are in two groups. First, those where the Tribunal may act on a concession that an issue is not pursued and not inquire into the issue itself: cf *Comcare v Fiedler* (2001) 115 FCR 328 per Drummond, Kiefel and Dowsett JJ at [39]; and *Repatriation Commission v Warren* (2008) 167 FCR 511 per Lindgren and Bennett JJ at [78] (Warren). Second, those where the Tribunal should have considered an hypothesis even though it was not expressly raised: cf *Hill v Repatriation Commission* (2005) 218 ALR 251 per Wilcox, French and Weinberg JJ at [104] (Hill); *NABE v Minister for Immigration and Multicultural and*

Indigenous Affairs (2004) 144 FCR 1 at [59]-[60].

50 In Warren at [78] Lindgren and Bennett JJ made the following useful observations:

- The general rule that a litigant is bound by, and accordingly is entitled to act on, admissions and concessions does not automatically apply, although cases concerned with the exercise of judicial power may be of assistance (Kuswardana 54 FLR at 342; 35 ALR at 194 per Bowen CJ).
- A party to the proceeding is not necessarily precluded from arguing on "appeal" matters that were conceded before the Tribunal. Whether the party is so precluded depends on the nature of the matter conceded, its conduct of its case, whether the concession represented an agreement by the parties as to the facts to be decided and other relevant circumstances (Kuswardana 54 FLR at 343; 35 ALR at 195 per Bowen CJ and at 348; 199 per Fox J).

51 In my view, those passages from Warren support the consideration by the Court of this ground of appeal. It must be assumed that the Tribunal, notwithstanding the concession, considered the issue of whether the applicant was tortured to be of sufficient merit as to require its consideration. This case is the reverse of *Kuswardana v Minister for Immigration and Ethnic Affairs* (1981) 54 FLR 334. There, counsel had conceded a matter before the Tribunal (the Migration Act 1958 (Cth)) at that time provided for deportation orders to be reviewable by the Tribunal) so the Tribunal did not further address it, even though the concession was erroneous and the Tribunal's decision was, in consequence, in error on a question of law. Bowen CJ's approach in that case at 343 affirmed that the Tribunal had a prescribed statutory structure within which to make its decision, and it did so except for considering the conceded issue. In fact, it was noted if the material objectively required the Tribunal to have considered the conceded issue, it was in error on a question of law not to have done so and the interests of justice require that the error be corrected. To do otherwise would have had serious adverse consequences to the applicant. Here, the Tribunal has considered the apparently conceded issue, and there is no suggestion here that the respondent would have conducted its case before the Tribunal any differently. The same evidence was relevant to the other relevant element of the definition of a category 1A stressor, namely a serious physical attack or assault. There is no other suggested prejudice to the respondent if the contention is considered.

52 There are steps underpinning the argument based on the expression of being tortured. The first ground is whether that expression has a special legal meaning. If answered in the affirmative, the second ground is whether the Tribunal's misconstruction led to its failure to take into account a relevant consideration, that is, whether the applicant's mental pain or suffering amounted to "torture".

53 In my view, the Tribunal at [26] of its reasons has not expressly acknowledged that torture in its ordinary meaning includes the infliction of severe physical or mental pain or anguish: cf *Macquarie Dictionary* (6th ed, Macquarie Dictionary Publishers Pty Ltd, 2013) (the *Macquarie Dictionary*). That is consistent with the meaning of "torture" as defined in art 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment opened for

signature 10 December 1989, 1465 UNTS 85 (entered into force 26 June 1987) (the Convention) which came into force in 1987. In the following year, Australia adopted the meaning of "torture" in the Convention and introduced the Crimes (Torture) Act 1988 (Cth) (repealed), which defines an "act of torture" in s 3(1) as meaning:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

(a) For such purposes as:

(i) obtaining as obtaining from him or a third person or a confession; or

(ii) punishing him for an act he or a third person has committed or is suspected of having committed, or

(iii) intimidating or coercing him or a third person; or

(b) for any reason based on discrimination of any kind; ...

The definition of "torture" in that enactment was superseded by s 274.2 of the Criminal Code Act 1995 (Cth) (the Criminal Code), which is in relevantly similar terms.

54 The respondent advanced the submission that the definition of torture for the purposes of that legislation, which seeks to prevent and penalise particular conduct, cannot be considered as showing the accepted legal meaning of "torture" for other purposes. The respondent went on to say that in some contexts, that definition may be considered too narrow and, in other contexts such as SoP, it may be too broad. I accept that it is inappropriate to adopt a statutory definition of "torture" from another enactment and import it into the relevant SoP, by using it to define an undefined term in SoP.

55 However, in my view, if the Tribunal intended to exclude mental pain or anguish, it was in error. That is because the ordinary usage or definition of torture (or its consequences) includes physical or mental pain or anguish.

56 Clause 6(a) of SoP No 6 says that a category 1A stressor is a factor that must exist before it can be concluded that the applicant's PTSD was defence-caused. Clause 9 defined a category 1A stressor as set out above.

57 As the Macquarie Dictionary definition indicates, "torture" may be a verb or a noun in its common usage. In SoP No 6, it is the expression "being tortured". I accept that the process of being tortured can include the infliction of serious physical or mental pain or anguish. However, whilst the wording used by the Tribunal is perhaps infelicitous, I do not read its reasons in the narrow and confined way the applicant contends.

58 The context is the Tribunal's earlier consideration of the bullying conduct. The Tribunal, following Border, said that each of the elements in cls 9(b) and 9(c) of the definition of a category 1A stressor in SoP No 6 focus on the objective seriousness of the event or conduct. It noted at [24] of its Reasons for Decision that the subjective response to an event might provide some guide as to its objective seriousness, but added:

... but my concerns with the reliability of [the applicant's] evidence do not allow me to consider his descriptions of his responses to be accurate.

59 The Tribunal then considered, and rejected, that the bullying conduct amounted to a serious physical attack or assault. The conduct involved is recorded in the Tribunal's Reasons for Decision at [25] as set out in [21] above.

60 At [26], in relation to whether the applicant was subjected to torture, the Tribunal says the applicant's description of the nature and frequency of the conduct left the Tribunal "well short of being satisfied that it amounted to torture". It is immediately following that finding that the Tribunal refers to the word "torture" having no special meaning, and that its ordinary usage is the "infliction of severe bodily pain ...".

61 There was no attempt by the applicant to assert that the Tribunal's analysis of the correct process, based on Border, was incorrect. Accordingly, once the evidence of the applicant about his psychological reaction to the bullying conduct was discounted, the Tribunal was left with his description of the bullying conduct. In effect, the Tribunal said that it was not satisfied that, in fact, the applicant did react adversely to the "verbal and psychological abuse" as an element or feature of the bullying conduct, as he claimed. That was an assessment the Tribunal was required to make for the purpose of deciding whether he was being tortured. It is not shown to have failed to consider a relevant consideration. That is, not to accept that the Tribunal's factual assessment was correct. But factual error is not within the role of the Court to correct. I do not need to address what may be a factual error, in the present circumstances converts to, or also amounts to an error on a question of law, having regard to the accepted diagnosis of PTSD as it is defined. That is simply because, in my view, the Tribunal has erred on a question of law, on the alternative basis of the applicant's submissions, as outlined below.

62 However, on that analysis, I do not accept that the Tribunal erred on a question of law by limiting the concept of "being tortured" to the infliction of severe bodily pain. In my view, it considered whether the bullying conduct had caused the applicant the mental anguish he described, and it did not accept that it had because it did not accept him as a reliable reporter of his reaction to the bullying behaviour. His evidence was that he was "absolutely terrified" and as "verbal and psychological abuse [which] was worse than the physical abuse": cf Tribunal Reasons for Decision at [19]. By not being satisfied that the applicant had those reactions to the bullying conduct, the Tribunal was left to assessing whether the bullying conduct amounted to the applicant "being tortured". Absent the psychological element (for the reasons given) its focus on the physical consequences is understandable.

63 In that context, I do not think the Tribunal did exclude mental anguish generally being a consequence of torture, but rather – having not accepted the evidence of mental anguish given by the applicant – that it then turned to the physical consequences to see if they amounted to torture.

64 Accordingly, I do not consider that grounds (1) and (2) of the grounds of appeal are made out insofar as they concern cl 9(c) of the definition of a category 1A stressor in SoP No 6.

65 Whilst these grounds of appeal have not succeeded in that respect, it is clear that a category 1A stressor may involve conduct which has only, or only significant, psychological consequences. That follows from cl (a) of the definition, together with the fact that PTSD is defined in cl 3 of SoP No 6 as a psychiatric condition where, inter alia, a person has been exposed to a traumatic event and amongst other things, having experienced, witnessed or being confronted with actual or threatened death or serious injury, and having a response involving intense fear, helplessness or horror.

(i) The serious assault claim

66 The applicant also argues the Tribunal incorrectly interpreted "serious assault" in the context of cl 9(b) of SoP No 6. It is asserted that the Tribunal wrongly required there to be contemporaneous reporting or serious injury. The relevant section of the Tribunal's Reasons for Decision is set out at [21] above.

67 This ground of appeal asserts that the Tribunal erred in law at [25] of its Reasons for Decision in concluding that the bullying behaviour did not amount to the applicant being exposed to a serious physical attack or assault.

68 I do not share the Tribunal's factual assessment of the bullying behaviour as "relatively minor". It was accepted that the bullying behaviour occurred recurrently, a few nights each week, whilst the applicant was at Balcombe. He was then a junior apprentice, and for part of the period only 15 years old. The bullying behaviour had led to another junior apprentice being hospitalised. The applicant suffered cuts and bruises. The Army regarded it seriously enough to discharge four senior apprentices. However, a different assessment of the quality of undisputed or accepted facts does not itself demonstrate an error on a question of law. That requires, if appropriate, a further step to be taken.

69 I am however satisfied that, in the assessment of whether the applicant was exposed to a severe traumatic event, that is a category 1A stressor, the Tribunal misdirected itself about what constitutes a "serious physical attack or assault".

70 The Tribunal's Reasons for Decision at [25] elide the assessment of the quality of the conduct with the consequences of the conduct to the particular person (the applicant). In my view, that is the error. It is hardly debatable that the junior apprentice who was hospitalised suffered his injuries through a serious physical attack or assault. So, one may ask rhetorically, how can the bullying conduct amount to a serious physical attack or assault to one apprentice, but not to another. Whilst the actual consequences of conduct may inform the character of an assault, the

corollary is not necessarily the case. In my view, the Tribunal has misdirected itself by focusing on the physical consequences of the bullying conduct upon the applicant.

71 There is a further reason why I consider the Tribunal has fallen into error. The reference by the Tribunal to the applicant saying the verbal and psychological abuse was worse than any assaults is, in its context, intended to illustrate why the adverse physical consequences of the bullying behaviour were not serious. Clearly, SoP No 6 provides for adverse psychological consequences of traumatic events, including an assault. That is its purpose, as the definition of PTSD in SoP No 6 shows. To fail to take into account the claim that the consequences of the bullying behaviour produced adverse psychological consequences (a claim recognised by that reference to the applicant's evidence) was itself an error on a question of law. Whether it reflects a misconstruction of SoP No 6, or its misapplication, does not matter much. Even if it be the case that the Tribunal did not believe that the applicant himself was scared or upset at all by the bullying conduct and its anticipation (and, I note, there is no express rejection of that claim), there was other evidence from other junior apprentices which was not contested and which supported the claim that the bullying conduct was traumatising. It includes the brief statements of Williams, Boss and Carpenter and perhaps Campbell. That evidence, reflecting the subjective responses to the bullying conduct, is capable of informing the qualitative assessment of the bullying conduct.

72 In my view, therefore, the Tribunal fell into error on a question of law in its consideration of whether the applicant suffered a category 1A stressor by the bullying conduct before the clinical onset of PTSD: cl 6(a) of SoP No 6. It was not entitled to de-classify the character of the bullying conduct because it did not accept that the applicant was as traumatised as he claimed to be. As it said itself, following *Border*, the characterisation of the conduct is an objective one.

73 There is a causative connection required to be established between that stressor and the applicant himself – that is the diagnosis of PTSD under cl 3 of SoP No 6, as it requires exposure to a traumatic event of a particular character (relevantly the category 1A stressor) and a response. The applicant has, by the diagnosis, been found to have had that response. As noted, there was no challenge before the Tribunal to the diagnosis that the applicant suffered from PTSD within the meaning of SoP No 6.

Alcohol dependence

74 Regarding alcohol dependence, the applicant relies on grounds (3) to (6) set out in [45] above.

75 As in the case of the PTSD claim, the Tribunal accepted the diagnosis of Mr Ewer that the applicant suffers from alcohol dependence. For this injury to be defence-caused, the category 1A stressor must have occurred within two years before the clinical onset of alcohol dependence: cl 6(d) of SoP No 2. However, because the Tribunal had already concluded that what the applicant experienced did not amount to a category 1A stressor as defined in SoP No 2, it did not consider in great depth the issue of clinical onset. However, it said at [30]:

Moreover, ... there is no evidence from which the time of clinical onset could be determined and thus it is impossible to tell whether there was clinical onset in [the applicant's] case within two years after the conduct complained of by [the applicant].

76 I have concluded that the Tribunal committed an error on a question of law in its approach to whether the events amounted to a category 1A stressor in SoP No 6 regarding PTSD. The same definition of a category 1A stressor is used in cl 9 of SoP No 2 regarding alcohol dependence, so I conclude for the same reasons that the Tribunal fell into the same error.

77 That is not an end to this aspect, because the relevant factor in cl 6(a) includes that the stressor was experienced within two years of the clinical onset of alcohol dependence. That was a matter the Tribunal was required to be satisfied about.

78 The Tribunal did not make a finding regarding the exact time of clinical onset but it determined at [38] that it did not occur within two years of the asserted category 1A stressor, namely the bullying behaviour. It said there was no evidence, beyond the applicant's evidence of excessive consumption of alcohol, that there was clinical onset of alcohol dependence in the two years after the bullying conduct. It said Dr Ewer had not addressed the time of clinical onset.

79 In the course of the hearing of this application, indeed during the reply submissions, counsel for the applicant first referred the Court to paras 20.2 and 20.3 of Dr Ewer's report of 4 December 2012. The respondent was given leave to make further written submissions on the issue.

80 That report, in response to the question of when the applicant's alcohol dependence initially began, says that it began in 1973, and had been in remission for many years but returned recently.

81 The respondent, in its responsive written submissions, accepts that the Tribunal was in error on that matter. It was, as noted, an error not picked up by the applicant until very lately. The respondent also accepts that the reasoning on the topic was illogical or irrational: cf *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 621 at [131]-[133] so that if the error were material, the application should be allowed. Its materiality depends on whether the Tribunal erred on a question of law in concluding that the applicant had experienced a category 1A stressor. As I have concluded that the Tribunal was in error in that respect, the applicant also succeeds on that ground.

82 It is also desirable to address ground (4) of the grounds of appeal, based upon the alternative claim based upon factor (e) in cl 6 of SoP No 2, namely being the recipient of severe childhood abuse within the ten years before the clinical onset of alcohol dependence. The definition of severe childhood abuse in cl 9 of SoP No 2 is set out above.

83 The option is enlivened because the applicant was under 16 years of age in the first three months or so of his defence service, and during part of the bullying conduct. The applicant's primary argument before the Tribunal and on this application, as the written outline indicates, is that the senior apprentices who engaged in the bullying conduct were care providers.

84 The applicant clearly meets the clinical onset requirement in this particular claim, in the light of Dr Ewer's report of 4 December 2012. The applicant contends that cl 9(b) of the definition of a category 1A stressor of "severe childhood abuse" is applicable in this case.

85 In my view, the Tribunal is not shown to have misconstrued the undefined term "care providers" in [33] of its Reasons for Decision. In an ordinary sense, a care provider is a person tasked with, or accepting responsibility for, the provision of care. The Tribunal did not depart from that meaning. Its use of the word "formal" is merely descriptive of its application of the ordinary meaning, rather than imposing a meaning other than the ordinary meaning.

86 The applicant also contends that the Tribunal erroneously narrowed its inquiry to senior apprentices as care providers without considering them as "an adult who works with or around that child, or any other adult in contact with that child". I do not accept that submission. Albeit briefly, the Tribunal addressed the alternatives at [34] of its Reasons for Decision. During the hearing, the Tribunal asked the applicant to provide written particulars of how it was to be shown that the senior apprentices were adults, that is over the age of 18 years. The applicant did not further address the issue. The evidence before the Tribunal was capable of showing that the senior apprentices were under 18 years old during the bullying conduct. If, as suggested, there is evidence that one senior apprentice was over the age of 18 years, that, in the circumstances, does not demonstrate an error on a question of law.

87 For those reasons, I would dismiss ground (4) of the grounds of appeal.

88 It is not necessary to separately address grounds (3) and (5) of the grounds of appeal.

Hypertension

89 Grounds (7) and (8) of the grounds of appeal relate to the condition of hypertension.

90 Clause 6(b) of SoP No 64 identifies the relevant causative factor, namely that the applicant consume an average of at least 500 grams of alcohol per week for at least six months before the clinical onset of hypertension.

91 The Tribunal found that there was no evidence of the date, or the approximate date, of clinical onset, and no evidence from which that date might reasonably be inferred. Further, the Tribunal found that there was no evidence as to the extent of the applicant's consumption of alcohol with any degree of particularity. Its reasons show that it specifically considered the material to which it was referred by the applicant.

92 The applicant's contention is that the Tribunal failed to make a decision on a matter it was required to decide. I do not accept that. It identified the relevant factual matters it was required to address: the time of clinical onset of hypertension, and the dates or period of consumption of alcohol by the applicant and the relationship of that period to the time of clinical onset. It was not satisfied that the time of clinical onset of hypertension was within the six month period of consumption relied on by the applicant. Nor was it satisfied that the applicant's consumption during that period was at the level specified. It was required to have a level of reasonable

satisfaction on those two matters by s 120(4) of the Act. It did not have that level of satisfaction. It was not specifically required to find precisely when the clinical onset of hypertension occurred, or the applicant's level of consumption of alcohol during the period he specified.

93 Accordingly, ground (7) of the grounds of appeal is not made out.

94 The applicant's last ground of appeal is that the Tribunal engaged in irrational or illogical processes of reasoning in its application of SoP No 64. The applicant contends that the Tribunal relied on the general statement of the applicant that he "always had high blood pressure" to disregard specific medical evidence of increases in blood pressure over time and to reach the conclusion that the time of clinical onset could not be determined. The applicant also contends that it was illogical for the Tribunal to find that the applicant's alcohol consumption did not meet the required level without first determining his actual level of alcohol consumption.

95 I do not accept either contention.

96 The Tribunal referred to and considered the material referred to. I see no reason to conclude that, having regard to that material, it could not rationally have been left unpersuaded, or with a lack of reasonable satisfaction, on the two factual issues.

97 In my view, the Tribunal's process of reasoning was not illogical or irrational.

98 I would dismiss ground of appeal (8).

conclusion

99 For the reasons above, I am persuaded that grounds (1), (2), (3) and (6) of the grounds of appeal are made out. I order that the matter be remitted for consideration by the Tribunal according to law and in accordance with these reasons. The order made will reflect that the errors on a question or questions of law are confined to the applicant's claim in respect of PTSD and alcohol dependence. The parties accepted that the costs of the application would follow the event, so the respondent is to pay to the applicant his costs of the application.

I certify that the preceding ninety-nine (99) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate:

Dated: 11 March 2015

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